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December 10, 2003

Mr. Corbin Davis, Clerk
Michigan Supreme Court
Michigan Hall of Justice
P.O. Box 30052
Lansing, MI 48909

Re: Administrative File No. 2003-30
Proposed amendment of MCR 2.112, 2.118, and 2.401

Dear Mr. Davis:

I write to support the proposed amendments to these rules, which would (1) require prompt challenges to notices of intent to sue and affidavits of merit and meritorious defense in medical malpractice cases; (2) provide for relation back of amendments to affidavits of merit and meritorious defense; and (3) confirm a trial court's authority to set deadlines for filing summary disposition motions and for challenging qualifications of an expert witness. These proposals originated in the State Bar Committee on Civil Procedure and Courts in 2002-2003 and the State Bar Representative Assembly approved them in 2003.* I refer the court to the Civil Procedure and Courts Committee's presentation to the Representative Assembly (copy enclosed) for the reasons supporting these proposals.

I write to address two additional matters.

1. First, as can be seen from the enclosure, as part of this package of amendments, the Civil Procedure and Courts Committee recommended an amendment to MCR 2.116 as follows:

*Although the proposals were drafted while I chaired the Civil Procedure and Courts Committee, I write now solely as an individual and not on behalf of the committee or the State Bar.

Rule 2.116 Summary Disposition

(A)-(C) [Unchanged.]

(D) Time to Raise Defenses and Objections. The grounds listed in subrule (C) must be raised as follows:

(1)-(2) [Unchanged.]

(3) The grounds listed in subrule (C)(4)~~, (8), (9), and (10)~~ may be raised at any time.

(4) Unless the court orders otherwise, the grounds listed in subrule (C)(8), (9), and (10) may be raised at any time.

The purpose of this amendment was to dovetail with the amendment to MCR 2.401(B)(2)(a)(vi), which confirms a court's authority to set a dispositive motion deadline in a scheduling order. Although that is a frequent practice, current MCR 2.116(D)(3)—allowing a party to file certain summary disposition motions "at any time"—could be read as prohibiting the court from setting a deadline for summary disposition motions. One could read the provision in MCR 2.401(B)(2)(a) allowing the court to "establish times for events the court deems appropriate" as including the authority to set a dispositive motion cutoff deadline. But that is in tension with the express language of current MCR 2.116(D)(3). The Civil Procedure and Courts Committee thought it best to resolve this tension by making the court's authority to set a time for summary disposition motions explicit in both rules. Thus the committee's proposal included an amendment to MCR 2.116(D) to make the right to file certain summary disposition motions "at any time" subject to the court's authority to "order[] otherwise." (The proposal retains the current language for motions under MCR 2.116(C)(4) (lack of subject matter jurisdiction) because case authority provides that lack of subject matter jurisdiction may be raised at any stage of a case, even on appeal.)

The Representative Assembly, by deleting the proposed amendment to MCR 2.116(D) but recommending the amendment to MCR 2.401(B)(2)(a), created a conflict between the two rules. I urge the Court to adopt the amendment to MCR 2.116(D) as proposed by the Civil Procedure and Courts Committee.

2. The Court's administrative order solicits comments on "whether the adoption of the proposed amendments would conflict with this Court's decisions in *McDougall v Schanz,* 461 Mich 15 (1999), and *Greathouse v Rhodes,* 465 Mich 885 (2001)." As the enclosed recommendation notes, the Court's opinion in *Greathouse* was one of the things that prompted this proposal. *Greathouse* held: "There is no

statutory or case law basis for ruling that a medical malpractice expert must be challenged within a 'reasonable time.'" 465 Mich at 885. The proposal is intended to change this by authorizing the court to set a deadline for challenging qualifications in order to discourage strategic delay in such challenges—delay with the expectation that a case could be disposed of based on exclusion of expert testimony at a time when a party cannot obtain another expert in time for trial. Adopting a rule that requires that challenges to expert witness qualifications be brought by a specified time is within the Court's authority under *McDougall*. This involves "judicial dispatch of litigation" (461 Mich at 30) and not any other legislative policy considerations, since the statutes do not address the time for such challenges.

The same analysis applies to setting a deadline for challenges to notices of intent and affidavits of merit and meritorious defense. Setting such deadlines involves "judicial dispatch of litigation" and does not conflict with any legislative policy considerations, since the statutes do not address the time for such challenges.

The Court should note that the proposal still leaves these matters to the trial court's discretion. The court can allow later challenges to notices of intent and affidavits of merit and meritorious defense "for good cause" under proposed MCR 2.112(L)(2). Thus the court can take into consideration the availability of information necessary to make the challenge through discovery or otherwise when considering whether a later challenge is appropriate. And the court need only set a deadline for challenging an expert witness's qualifications under proposed MCR 2.401(B)(2) if the court "deems [it] appropriate."

The provision in the proposed amendment to MCR 2.118(D) for relation back of amendments to affidavits likewise does not raise a *McDougall* question. The question of relation back of amendments is something that the current court rules treat as procedural and involves "judicial dispatch of litigation." Relation back of amendments to affidavits does not conflict with legislative policy considerations, since the statutes do not address amendments to affidavits.

Sincerely,

Richard Bisio

cc: Ronald Longhofer, Chair,
State Bar Committee on Civil Procedure and Courts

385455

STATE BAR OF MICHIGAN
CIVIL PROCEDURE AND COURTS COMMITTEE

Proposed Court Rule Amendments Regarding Challenges to Medical Malpractice Notices of Intent to Sue, Affidavits and Expert Witness Qualifications; Time for Filing Dispositive Motions

I. Recommendation to the Representative Assembly

The Civil Procedure and Courts Committee urges the Representative Assembly to approve the following amendments to the Michigan Court Rules and transmit them to the Michigan Supreme Court with a recommendation that the Court adopt the amendments.

Rule 2.112 Pleading Special Matters

(A)-(K) [Unchanged.]

(L) Medical Malpractice Actions.

(1) [Current text of (L)]

(2) In a medical malpractice action, unless the court allows a later challenge for good cause:

(a) all challenges to a notice of intent to sue must be made at the time the defendant files its first response to the complaint, whether by answer or motion, and

(b) all challenges to an affidavit of merit or affidavit of meritorious defense, including the qualifications of the signer, must be made within 63 days of the filing of the affidavit.

Rule 2.116 Summary Disposition

(A)-(C) [Unchanged.]

(D) Time to Raise Defenses and Objections. The grounds listed in subrule (C) must be raised as follows:

(1)-(2) [Unchanged.]

(3) The grounds listed in subrule (C)(4), ~~(8), (9), and (10)~~ may be raised at any time.

(4) Unless the court orders otherwise, the grounds listed in subrule (C)(8), (9), and (10) may be raised at any time.

Rule 2.118 Amended and Supplemental Pleadings

(A)-(C) [Unchanged.]

(D) Relation Back of Amendments. An amendment that adds a claim or defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading. **In a medical malpractice action, amendment of an affidavit of merit or affidavit of meritorious defense relates back to the date of original filing of the affidavit.**

Rule 2.401 Pretrial Procedures; Conference; Scheduling Orders

(A) [Unchanged.]

(B) Early Scheduling Conference and Order.

(1) [Unchanged.]

(2) Scheduling Order.

(a) At an early scheduling conference, under subrule (B)(1), a pretrial conference under subrule (C), or at such other time as the court concludes that such an order would facilitate the progress of the case, the court shall establish times for events the court deems appropriate, including

(i)-(iii) [Unchanged.]

(iv) the exchange of witness lists under subrule (I), ~~and~~

(v) the scheduling of a pretrial conference, a settlement conference, or trial.

(vi) the filing of summary disposition motions, and

(viii) a date for challenging the qualifications of an expert witness.

II. Reasons Supporting the Proposals

The purpose of the amendments is to require prompt challenges of notices of intent to sue and affidavits of merit and meritorious defense in medical malpractice cases, prompt challenges to expert witness qualifications in all cases, and to encourage filing of dispositive motions before trial.

A. Challenges to Notices of Intent, Affidavits of Merit and Meritorious Defense, and Expert Qualifications

These changes are prompted by the Supreme Court's decision in *Greathouse v Rhodes*, 455 Mich 885, 636 NW2d 138 (2001). The Court reversed a decision by the court of appeals that a party must challenge the qualifications of a medical expert in a medical malpractice case within a reasonable time after learning the expert's identity. 242 Mich App 221, 231, 618 NW2d 106, 111 (2000).

In *Greathouse*, the plaintiff filed a motion to strike the defendant doctor's three experts less than a month before trial and contrary to the trial court's scheduling order, requiring such motions to be heard before the settlement conference. The court of appeals affirmed the trial court's denial of the motion. It held that "a party's failure to challenge an expert's basic qualifications under subsection 2169(1)(a) within a reasonable time after learning the expert's identity results in forfeiture of the issues." 242 Mich App at 231, 618 NW2d at 111. The court pointed out that plaintiff was aware of one of the experts "at or near the beginning of the litigation" and learned of the others "almost a year before trial" when deposing the defendant. 241 Mich App at 234, 618 NW2d at 113. Because of this, "plaintiff had numerous means by way of discovery to determine the practice qualifications of Rhodes and his proposed experts well before the month of trial. . . ." 241 Mich App at 234-235, 619 NW2d at 113.

The Supreme Court granted a delayed application for leave to appeal and summarily reversed. It stated: "There is no statutory or case law basis for ruling that a medical malpractice expert must be challenged within a 'reasonable time.'" 465 Mich at 885.

The committee believes that this result is unfair. It encourages delay in challenging expert qualifications with the expectation that the case could be disposed of based on exclusion of expert testimony at a time when a party cannot obtain another expert in time for trial. Issues such as this should be addressed at a time when problems can be cured so that a case is decided on the merits rather than by procedural maneuvering. Similar issues likewise arise in challenges to a plaintiff's notice of intent to sue and affidavit of merit and a defendant's affidavit of meritorious defense. *Roberts v Mecosta County General Hospital*, 466 Mich 57, 70, 642 NW2d 663, 671 (2002) (defendant need not raise objections to notice of intent until tolling of statute of limitations becomes an issue); *Scarsella v Pollak*, 461 Mich 547, 607 NW2d 711 (2000) (plaintiff's omission of affidavit of merit resulted in dismissal; no amendment allowed to relate back to avoid statute of limitations bar); *Wilhelm v Mustafa*, 243 Mich App 478, 624 NW2d 435 (2000) (plaintiff did not raise defendant's failure to file affidavit of

meritorious defense until day of trial). Thus the committee proposes rule amendments that would reverse the result in *Greathouse* and also require prompt challenges to notices of intent and affidavits of merit and meritorious defense in medical malpractice cases.

To accomplish this, the committee approved proposing the following amendments at a meeting on May 18, 2002:

1. Add a provision to MCR 2.112(L) that requires a defendant to challenge a notice of intent to sue at the time of an answer or pre-answer motion. The proposal also requires challenges to an affidavit of merit or affidavit of meritorious defense within 63 days of filing of the affidavit. In most cases, this should give the opposing party sufficient time to determine the qualifications of the person signing the affidavit. The trial court would have discretion to extend these times on a showing a good cause.

2. Provide in MCR 2.118(D) that amendment of an affidavit of merit or affidavit of meritorious defense relates back to the date of original filing of the affidavit. This is consistent with the general principle that an amendment that adds a claim or defense relates back to the date of the original pleading if the new claim or defense arises out of the "conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading." MCR 2.118(D). An amendment to an affidavit should be treated in the same way as an amendment to a pleading. This would not permit the filing of a new claim or defense that would not otherwise relate back, since that would require amendment of the pleading, not just the affidavit. Neither is this intended to change the result of *Scarsella v Pollack*, 461 Mich 547, 607 NW2d 711 (2000), which held that filing a complaint without an affidavit of merit was insufficient to commence a suit. The proposal deals only with an amendment to an affidavit, a matter that *Scarsella* did not address. 461 Mich at 553, 607 NW2d at 715 ("This holding does not extend to a situation in which a court subsequently determines that a timely filed affidavit is inadequate or defective"); *Holmes v Michigan Capital Medical Center*, 242 Mich App 703, 712 n4, 620 NW2d 319, 324 n4 (2000) ("The Supreme Court's language [in *Scarsella*] seems to suggest its contemplation that an affidavit of merit failing to comply with the substantive requirements imposed by M.C.L. § 600.2912d(1)(a)-(d); MSA 27A.2912(4)(1)(a)-(d), when filed together with a complaint, might possibly be sufficient to commence a medical malpractice action").

3. Provide in MCR 2.401(B)(2)(a)(vii) that a scheduling order include a deadline "for challenging the qualifications of an expert witness." This requirement would apply only to a challenge to the qualifications of the witness to testify as an expert, not to the expert's opinion. The requirement also would apply to all experts, not just those in medical malpractice cases. The concerns raised by *Greathouse* apply equally to other experts. The rule would still give the court ample discretion to deal with different situations by leaving it open as to when the court would require such challenges. While we would anticipate that most such challenges would be required before trial and while there was an opportunity to obtain another, qualified expert, the court would have discretion to defer the challenge to the time of trial in an appropriate case.

B. Time for Filing Dispositive Motions

The proposals discussed above address delay in raising challenges to notices of intent to sue, required affidavits in medical malpractice cases, and expert qualifications. The same concern that prompts them also applies to scheduling summary disposition motions. It is desirable for a fair determination of a case to have summary disposition motions filed and heard before trial rather than at the time of trial. Indeed, many scheduling orders include a deadline for filing summary disposition motions.

To encourage this, the committee proposes to add MCR 2.401(B)(2)(a)(vi), requiring that a scheduling order include a time for filing summary disposition motions. This requires a conforming change to MCR 2.116(D)(3), which currently provides that a party may file a summary disposition motion under MCR 2.116(C)(4), (8), (9), and (10) "at any time." We propose modifying that provision by saying that (C)(8), (9), and (10) motions can be raised at any time, "[u]nless the court orders otherwise." Since, as a matter of substantive law, subject matter jurisdiction can be raised at any time, we would retain the present rule for (C)(4) motions.

III. Fiscal Impact

No fiscal impact is anticipated.

IV. Staffing Impact

No staffing impact is anticipated.

V. Prior Assembly Action

The Assembly has not taken any prior action on this subject.

Respectfully submitted by:

Richard Bisio
Co-Chair, Civil Procedure and Courts Committee

December _____, 2002

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